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QUESTIONS PRESENTED

1. May a state, consistent with the First Amendment, impose a categorical ban forbidding certified public accountants from engaging in any direct, oral, uninvited solicitation of prospective clients?

2. Is Florida's categorical ban on any direct, oral, uninvited solicitation by CPAs a content-neutral "time, place, and manner" restriction subject to less exacting scrutiny than an outright ban on commercial speech?

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In The

Supreme Court of the United States

October Term, 1992

No. 91-1594

FRED H. EDENFIELD, *et al.*,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

BRIEF OF RESPONDENT

Introduction

This action was brought by respondent Scott Fane, a Florida certified public accountant ("CPA"), to challenge the constitutionality of a regulation adopted by petitioners, the members of the Florida Board of Accountancy ("Board"), that prohibits CPAs from engaging in any oral solicitation of new clients, whether face-to-face or by telephone. The district court granted Fane summary judgment, finding that the regulation did not further the asserted governmental interest of preventing collusion between businesses and CPAs when the CPA attests to the accuracy of audits or financial statements. The court of appeals affirmed for similar reasons.

This Court should affirm as well. Settled First Amendment doctrine requires the Board to establish that the regulation directly furthers a substantial state interest and is narrowly drawn. The fatal flaw in the Board's case is the lack of any nexus between the prohibition and the State's asserted interests. There is no evidence whatsoever -- empirical, anecdotal, or otherwise -- that CPAs who engage in oral solicitation are more likely to commit fraud by falsely attesting to financial statements than other CPAs. Nor is there any evidence that CPAs engage in the sort of abusive solicitation practices that led this Court to uphold a solicitation ban for lawyers in *Ohralik v. Ohio State Bar Association*. To the contrary, the extensive experience in the 47 states that permit oral solicitation by CPAs shows that there is no reason to believe that oral solicitation facilitates any kind of improper activity.

Equally hollow is the Board's argument that the regulation be given less searching scrutiny as a time, place, and manner restriction. The ban does far more than regulate the details of when, where, and how oral solicitation may take place. It outlaws an entire category of expressive activity: the oral solicitation of potential clients. Moreover, because the regulation can be justified only by reference to the content of the speech it suppresses, it is not content-neutral, and must therefore be subjected to the more exacting standards applicable to prohibitions on commercial speech, which it cannot meet. Finally, even if the ban is viewed as a time, place, and manner restriction, it is plainly unreasonable because it does not directly further an important state interest, and therefore cannot be sustained.

STATEMENT OF THE CASE

A. Background

Respondent Fane is a CPA licensed by the Florida State Board of Accountancy. Joint Appendix ("J.A.") at 9. Fane has an undergraduate degree in accounting from Rutgers, The State University of New Jersey, and a Masters Degree in Taxation from Georgia State University. *Id.* He has practiced as a CPA since 1981, with several years of accounting experience prior to becoming a CPA, and he has been employed by two national accounting firms. *Id.* at 10.

In July 1985, Fane moved from Haddonfield, New Jersey, to Homestead, Florida, where he wanted to build an accountancy practice. *Id.* However, he soon discovered a serious obstacle in his path: Florida is one of only three states that has erected a substantial barrier to competition among CPAs by prohibiting them from engaging in oral, uninvited solicitation of potential clients.[1]

Like other states, Florida comprehensively regulates the practice of accountancy through statutes and administrative rules, *see generally* Fla. Stat. Ann. §§ 473.301 *et seq.* (West 1991); Fla. Admin. Code §§ 21.A-24.001 *et seq.*, and Fane does not question Florida's power to supervise his profession. This case is narrowly focused on one provision of Florida law, providing that CPAs may be subject to disciplinary action, including license revocation, for "[e]ngaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board." Fla. Stat. Ann. § 473.323(1)(*l*).

To implement this provision, the Board of Accountancy, which is composed of seven CPAs and two members of the public, issued a regulation providing that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Fla. Admin. Code § 21A.24.002(2)(c). The regulation further states that "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation, and that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

[1] The other states are Texas and Louisiana. *See* Tex.Rev.Stat. art. 41a-1, § 6(a)(2)(Vernon's Supp. 1992) and Rules of Professional Conduct, Texas State Board of Public Accountancy, § 501.44 (Nov. 1989); and La.Rev.Stat. § 37.75(B), and 3 La.Admin.Code 46:XIX.507(D) (1988 Supp.). Georgia law authorizes its Board of Accountancy to restrict in-person solicitation, *see* O.C.G.A. § 43-3-35(i) (1988), but the Board repealed its ban on solicitation in January 1992, and its rules now permit in-person solicitation, so long as it is not misleading, deceptive, or coercive. I Rules and Regulations of the State of Georgia, Chapter 21-12-.15 (Feb. 1991 Supp.).

Id. (emphasis added). Accordingly, Fane is barred from visiting potential clients, from telephoning potential clients, and even from asking a potential client whom he happens to meet at a club or a social event if he or she is interested in discussing the services that Fane offers.

Florida's ban has seriously hampered Fane's ability to attract new clients. Fane is forbidden from undertaking the activities he needs to build his practice -- namely, contacting individuals who own or manage small to mid-size businesses in order to describe in full the services he offers and the prices he charges. J.A. at 11. If he could initiate such contacts, Fane could explain why his services are superior to those offered by other CPAs and accountants. Among other things, Fane would point out that he has eleven years of experience as a CPA, with training at two of the nation's most prestigious accounting firms; that he performs the work himself, unlike many competitors who use interns, trainees, or bookkeepers; that he is willing to tailor his services directly to his client's needs; and that he is exceptionally well qualified, having not only an accounting degree, but also a Masters Degree in Taxation and an appointment as an Adjunct Professor of Accounting at Miami Dade Community College. *Id.*

Florida's ban leaves Fane at a substantial competitive disadvantage for several reasons. First, the professionals against whom CPAs like Fane compete -- accountants, bookkeepers, tax preparers, and other financial experts -- are subject to neither the regulation challenged here, nor any other state-imposed restriction, and hence are free to engage in oral solicitation of prospective clients. Second, the ban seriously impedes Fane's ability to disseminate information about the services he offers. Broadcast advertising is prohibitively expensive. *Id.* Print advertising, which is permitted under Florida law, is no substitute for in-person contact both because the audiences are too diffuse, and because it does not allow for the full explanations and responses to questions that are so vital in informing a potential client about the services of a professional, such as a CPA. *Id.* Even direct, written solicitations suffer from many of the same limitations. *Id.*

B. District Court Proceedings.

Fane brought this action for declaratory and injunctive relief on August 17, 1988. In his motion for summary judgment, Fane challenged the Board's anti-solicitation regulation on the ground that it violates his First Amendment right to engage in commercial speech. Fane also argued that, by singling out CPAs -- but not other financial professionals against whom CPAs compete -- the ban discriminates against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment.

The sole defense offered by the Board was that the ban is needed to protect a CPA's integrity, independence, and objectivity in performing the "attest function" -- that is, the rendering of an independent opinion regarding a client's financial statements. Attestation permits those who use financial statements (*e.g.*, investors, lenders, and regulatory agencies) to rely on their accuracy. However, the Board submitted no evidence that oral solicitation has ever resulted in a false, fraudulent, or deceptive audit in Florida or in any of the 47 states where solicitation is permitted. Instead, the Board relied on the affidavit of Louis Dooner, a Florida CPA who had served as a member and Chairperson of the Florida Board of Accountancy and as a member of the Special Committee on Solicitation of the American Institute of Certified Public Accountants ("AICPA"). Mr. Dooner's affidavit simply asserted that "if a CPA has solicited the client he will be beholden to him" and that a CPA who solicits clients "is obviously in need of business and may be willing to bend the rules." J.A. at 19, 23. The Board also submitted the AICPA's *Report of the Special Committee on Solicitation*, but, as discussed more fully *infra* at 16-18, that report actually contradicts the Board's position because it concludes that there is no evidence to support a ban on solicitation.[2]

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[2] The AICPA is "the most important private group affecting the practice of accounting. It dominates all significant aspects of accounting because the accounting profession is largely self-regulated, and Federal and State authorities have recognized policies and procedures established by the AICPA as representing the decisions of the accounting profession." *The Accounting Establishment*, A Staff Study of the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations, S. Doc. No. 95-34, 95th Cong., 1st Sess. 9 (March 31, 1977)("*The Accounting Establishment*"). Among other things, the AICPA issues a Code of Professional Ethics, which, for the public accounting profession, is the equivalent of the American Bar Association's Model Rules of Professional Conduct.

The Board did not argue that direct solicitation by CPAs was inherently misleading, or that potential clients needed to be protected from overreaching by CPAs. Indeed, the Board disavowed this argument. Mr. Dooner's affidavit flatly asserted that the ban "is not to protect the public from solicitors." J.A. at 20. Nor did the Board present any evidence, from Florida or elsewhere, that CPAs who engage in oral solicitation have engaged in overreaching or abusive conduct.

After hearing argument, the district court granted Fane summary judgment. The court's opinion began by observing that, according to the Board, "the primary objective" of the ban is "to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent attestation is issued." *Id.* at 80. The court then rejected the Board's argument that *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), supported the regulation's constitutionality, even though the Board argued that the ban is intended to protect third parties, not clients. The court reasoned that the factors that led this Court to uphold a ban on in-person solicitation by lawyers in *Ohralik* -- the possibility of undue influence and overreaching by the attorney and the absence of alternative regulatory controls -- were not present here. J.A. at 83. The court noted that, while lawyers are "trained to be coercive, persuasive . . . [and] to take particular advantage of face-to-face situations," CPAs are not, and thus the "dangers associated with in-person solicitation by uniquely trained attorneys simply are not present in the CPA context." *Id.* The court also observed that the "two groups of potential clients that are targeted for solicitation are in significantly different positions." *Id.* at 84. Attorneys "zero in on an 'unsophisticated, injured or distressed lay person,'" *id.* (*quoting Ohralik*, 436 U.S. at 465), whereas CPAs "prefer to solicit prosperous business people" who tend to be "knowledgeable about financial matters and successful enough to require specialized accounting services." *Id.* at 84-85. These differences, the court concluded, rendered *Ohralik* inapplicable. *Id.*

The court then turned to the Board's argument that the ban protects third parties. This assertion "posits that the client is using the CPA to deceive that client's business associates or members of the public." *Id.* at 85. Rejecting this argument, the

court reasoned that the "link between [the] regulation and forbidden activities seems quite tenuous, if at all existent." *Id.* at 86. The court concluded that "the defendant's implicit assumption that a client is more likely to approach an *un*known CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA" with whom the client has had "a long-standing and mutually profitable relationship." *Id.* (emphasis in original).

Finally, the court rejected the Board's contention that a categorical ban was needed because of the difficulties in policing in-person solicitation. Unlike *Ohralik*, where the ban was imposed to prevent overreaching during face-to-face encounters between the attorney and the client, here the focus is on possible harm to third parties, which is easier to police. *Id.* Where CPAs are concerned, "proof regarding alleged misconduct is readily available" in the form of the audits or financial statements produced by the CPA, and the relevant facts "are objectively verifiable." *Id.* Accordingly, the court found that this rationale did not salvage the solicitation ban.

Based on its conclusion that the ban served no substantial state interest, the court entered summary judgment in Fane's favor and enjoined the Board from enforcing its regulation, but only as it applied to CPA solicitation "in the business context." *Id.* at 88. Having ruled on First Amendment grounds, the court did not reach Fane's equal protection claim. *Id.* at 79 n.3. The Board did not seek any stay of the district court's order, which has been in effect since September 13, 1990. Consequently, for the past two years, Fane and other Florida CPAs have engaged in solicitation "in the business context," without any reported untoward consequences.

C. The Court of Appeal's Ruling.

The Eleventh Circuit affirmed, with Judge Edmondson dissenting. Applying the analysis this Court has established for evaluating restraints on commercial speech, *see Board of Trustees v. Fox*, 492 U.S. 469 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court first

assessed whether the solicitation ban furthered an important state interest. J.A. at 96-97. Rejecting the Board's argument that the ban was needed to "protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function," *id.* at 96, the court stressed that "[n]owhere in the record . . . has [the Board] produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id.* at 97.

The court also concluded that, even if there were a nexus between the ban and the asserted state interest, there were means far less draconian than a categorical ban that would achieve the state's goal equally well. *Id.* Although the ban was allegedly aimed at preserving the sanctity of the attest function, it applied to all work performed by CPAs, even though many CPAs, like Fane, never exercise the attest function because they do not render opinions on audits or financial statements. *Id.* The court also noted that a number of "[r]egulatory requirements exist in Florida that can be utilized to preserve the attest function . . . [and that the] Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks." *Id.* at 98.[3]

The court next addressed the Board's contention -- raised for the first time on appeal -- that the regulation should be given minimal scrutiny as a content-neutral time, place, and manner restriction. The restraint cannot be so characterized, the court held, because it "acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how" such speech may take place. *Id.* at 99-100. The court also ruled that the ban is not content-neutral, but rather is a speaker-specific prohibition "on a category of expressive activity," *i.e.*, the direct,

[3] The court noted that Florida forbids a CPA from expressing an "opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise," J.A. at 98 (*quoting* Fla. Stat. Ann. § 473.315(1)), and from engaging in fraudulent or deceptive conduct. *Id.* (*citing* Fla. Stat. Ann. § 473.323(1)(f)). The court also observed that CPAs who negligently or fraudulently attest to financial statements expose themselves to tort liability. *Id.*

in-person solicitation of potential clients, that is subject to more searching scrutiny. *Id.*

Finally, the court found that differences between CPAs and lawyers rendered the Board's reliance on *Ohralik* misplaced. The court emphasized that the "possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud" that were rife in *Ohralik* "are remote in the accounting profession" because of the considerable differences in the training and clientele of lawyers and accountants. *Id.* at 102.

Judge Edmondson dissented, on the grounds that the "states are largely free to regulate the professionals which they license," and that *Ohralik* "is extremely persuasive and supports Florida's prohibition against in-person solicitation by CPAs." *Id.* at 103.

SUMMARY OF ARGUMENT

I.

Categorical restraints on commercial speech are strongly disfavored and may not be imposed merely because the state has unsubstantiated fears of isolated abuses. Such restraints may be sustained only if the state can affirmatively prove that the restraint directly furthers a substantial state interest and that it is narrowly tailored to that end. Florida's anti-solicitation regulation fails on both counts.

First, there is no evidence that the ban furthers any substantial state interest. Florida defends its ban by arguing that it protects CPAs from being lured into committing fraud by businesses in need of an undeserved clean financial opinion, and clients from being subjected to abusive solicitation practices by CPAs. However, there is not a shred of evidence to support the Board's claims. The available materials, including the only authoritative study uncovered by the parties, establish conclusively that there is no connection between in-person solicitation and wrongdoing by CPAs. What is more, Florida is virtually alone in imposing this restriction: 47 states and the District of Columbia

permit in-person solicitation by CPAs, and not a single federal regulatory agency that relies on audited financial statements, including the Securities and Exchange Commission, forbids in-person solicitation.

The lack of evidence to support Florida's ban is scarcely surprising given the inherent implausibility of the Board's theory. There is no reason to believe that a businessperson, looking to defraud associates or investors, would collude with a CPA who called out of the blue; nor is it likely that a CPA would be willing to risk his livelihood for a total stranger he happens to solicit. Yet the Board's position depends on both of these implausible assumptions. Nor is there merit to the Board's argument -- raised for the first time in this Court -- that CPA solicitation is fraught with the dangers to prospective clients identified by the Court in *Ohralik*. Not only is there no evidence that overreaching by soliciting CPAs has taken place, but the differences between lawyers and CPAs, and their respective clienteles, renders CPA misconduct of the sort the Board fears highly improbable.

Second, the ban is not narrowly tailored. Florida has in place a number of regulations which flatly prohibit -- and severely punish -- precisely the wrongdoing the Board seeks to prevent through the solicitation ban. CPAs who prepare fraudulent attestations or engage in deceptive conduct stand to lose their licenses, be subjected to fines and lawsuits, and go to jail. The Board has never explained why these direct and powerful deterrents are not sufficient. Moreover, the ban is far too sweeping, since it prohibits in-person solicitation for the wide array of non-attest function services performed by CPAs. Many CPAs, including Fane, rarely, if ever, exercise the attest function, yet they too are subject to a categorical ban applicable to all of their services. The Board has never explained why a ban limited to audit and attest functions would not serve its stated purpose equally well. Nor has the Board attempted to justify its sweeping prohibition on telephone solicitation. Whatever force the Board's concerns about face-to-face encounters may have, they evaporate when the prospective client need only hang up the telephone.

Lastly, the discrimination embodied in Florida's ban violates the Equal Protection Clause and demonstrates that the ban's real purpose is to stifle competition among CPAs, not to protect the public. Florida permits tax preparers, accountants, management advisory consultants, financial planners, and all other financial professionals against whom CPAs compete, to engage in oral solicitation without restriction, but it prohibits CPAs -- who are closely regulated by the state for competency and character and subject to the Board's disciplinary authority -- from engaging in solicitation even for non-attest related functions. By any measure, Florida's rule is irrational. If there were any justification for the solicitation ban apart from the attest function, it would surely apply with far greater force to non-CPAs, who are unregulated, than to highly regulated CPAs, yet only CPAs are forbidden from soliciting. Far from protecting the public, the ban on oral solicitation is one of the few remaining vestiges of earlier protectionist rules that sweepingly prohibited all forms of advertising, solicitation, and competitive behavior by CPAs -- rules which had to be abandoned because they clashed with the First Amendment. The same considerations that forced the elimination of those anti-competitive restraints compel affirmance of the judgment below.

II.

The Board's argument that its regulation should be judged under the time, place, and manner doctrine should also be rejected. The Board's last-ditch effort to characterize this regulation as a time, place, and manner restraint is in error, since the ban does not merely regulate when, where, or how CPAs may engage in direct, in-person, uninvited solicitation. Rather, it is a blanket, unqualified prohibition on an entire category of expression -- *i.e.*, the oral attempt to solicit potential clients. The Board's argument also misses the mark because the regulation, like all restraints on commercial speech, is clearly content-based. As such, the ban is subject to the standards this Court has articulated in the commercial speech context, which it cannot meet. At any rate, the ban cannot survive review under the time, place, and manner doctrine because it is a paradigm of an unreasonable, protectionist regulation. The Board has offered no evidence to establish that the ban furthers a substantial state interest. To the

extent that the Board claims to fear abusive solicitation practices by CPAs, the ban is irrational because it leaves all other financial professionals free to solicit without restraint. And, insofar as the Board seeks to defend the ban on attest function grounds, the ban is grossly overbroad, because it sweepingly prohibits solicitation for **any** work a CPA may perform. For these reasons, the ban cannot survive time, place, and manner scrutiny.

ARGUMENT

I. FLORIDA'S BAN VIOLATES THE FIRST AMENDMENT.

Introduction

This Court has repeatedly reaffirmed that commercial speech is entitled to substantial protection under the First Amendment. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990); *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). This principle springs from the recognition that the dissemination of commercial information about the nature, availability, and price of goods and services is highly beneficial to consumers and society. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

To minimize the suppression of valuable commercial information, the First Amendment requires "the government's goals to be substantial, and the cost to be carefully calculated." *Fox*, 492 U.S. at 480. Blanket prohibitions on commercial speech are highly suspect. The mere opportunity "for isolated abuses and mistakes does not justify a total ban on that mode of protected commercial speech." *Shapero*, 486 U.S. at 476; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

In *Central Hudson*, the Court laid down the now familiar four-part test for assessing the constitutionality of a restriction on commercial speech. That test inquires

> first, whether the speech concerns *"lawful activity"* and whether it is *"misleading"*;
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> second, whether the government's purported interest in regulating speech is *"substantial"*;
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> third, whether the legislation restricting speech *"directly advances the governmental interest asserted"*; and
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> fourth, whether the legislation is *"no more extensive than necessary"* to serve the government's interest.

Central Hudson, 447 U.S. at 566 (emphasis added); *see also Shapero*, 486 U.S. at 472; *Zauderer*, 471 U.S. at 638. Measured against this test, the Florida ban cannot be sustained.

As to the first component of the *Central Hudson* test, there is no question that the speech at issue here, which relates solely to Fane's efforts to convince prospective clients that they ought to retain him, concerns lawful activity and is protected by the First Amendment. *See, e.g., Shapero*, 486 U.S. at 473-75; *Zauderer*, 471 U.S. at 638; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Indeed, the Board conceded this point below. *See, e.g.*, Brief of Appellants Edenfield, *et al.*, No. 90-3943, at 38 (11th Cir.).

With regard to the state interests purportedly served by the anti-solicitation regulation, the Board's Brief demonstrates only that the Board is still searching for a rationale to justify the ban. Until now, the Board has defended the ban **solely** on the ground that it is needed to protect those who rely on financial statements by preserving CPA independence in the audit and attest functions. *See, e.g.*, J.A. at 20; Pet. for Cert. at 10, 11 & n.10. In this Court, the Board apparently recognizes the weakness of that argument, and, for the first time, claims that the ban is also needed

to protect prospective **clients** by "prevent[ing] fraud, overreaching or misrepresentation" when CPAs solicit tax, financial planning, or management advisory engagements. Pet. Br. at 24.[4]

Fane does not dispute that preservation of a CPA's independence and integrity, especially when performing the attest function, is an important state goal, *cf. United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), as is prevention of fraud, overreaching, and misrepresentation. But as *Central Hudson* and the other commercial speech cases make clear, simply pointing to a substantial state interest is only the first step in the analysis -- the Board must also prove both that the ban "directly advances the governmental interest asserted," *Central Hudson*, 447 U.S. at 566, and that it is "narrowly tailored to meet the desired objective." *Fox*, 492 U.S. at 480. As we now demonstrate, the Board has failed to satisfy both parts of the test.

A. There Is No Connection Between Florida's Ban and the Asserted State Interests.

1. The Board Has Failed To Establish That The Ban Protects CPA Independence.

The first reason why the regulation cannot survive the *Central Hudson* test is that the Board has failed to demonstrate any connection between the state's interest in preserving the integrity of CPAs and its ban on solicitation. The Board's argument rests on the premise that in-person solicitation presents

[4] The Board's indecision in identifying the likely villain and victim when it comes to CPA solicitation casts doubt on whether there is any state interest served by the ban. On the one hand, the Board postulates that the client is the true malefactor, because a CPA who solicits is in need of clients and is likely to be enticed into committing fraud by a business seeking an unwarranted clean opinion on an audit or financial statement. On the other hand, the Board now asserts that the CPA is the one under suspicion, because some CPAs may engage in abusive solicitation practices that will be injurious to potential clients. The Board makes these inconsistent arguments, even though it is obvious that a ban on oral solicitation cannot both guard against overreaching by clients and against overreaching by CPAs at the expense of those same clients.

a unique problem of fraud and abuse, posed by no other aspect of the CPA-client relationship or any other form of advertising and solicitation, because it somehow encourages CPAs to cast aside their professional responsibilities and to agree to participate in fraud. This premise necessarily relies on the following related assumptions: (a) businesses interested in obtaining an undeserved "clean opinion" on their financial statements are more likely to importune a CPA that they do not know, who contacts them out of the blue in-person or over the telephone, than a CPA with whom they have had prior dealings, or an unfamiliar CPA who contacts them through some written form of solicitation; and (b) CPAs who engage in oral solicitation are more likely to compromise their independence and integrity than all other CPAs, including those who engage in written solicitation.

These assumptions are transparently implausible. The Board's argument postulates that oral solicitation between a CPA and a potential client is a breeding ground for corruption. But, if anything, familiarity with, and financial dependence on, a regular client doubtless increase the likelihood that a CPA would be willing to compromise his or her professional judgment for the sake of that client. It is far more plausible that a CPA could be persuaded to shade the truth for a long-term client, on whose business the CPA relies financially, than for a total stranger. It is also far more plausible that a businessperson looking for a CPA with whom to collude in committing fraud would approach a CPA with whom he or she had prior dealings, and with whom communications are privileged, *see* Fla. Stat. Ann. § 473.316, than sit idly by, waiting to be solicited by an unfamiliar CPA, who might be more inclined to report the businessperson to the authorities and who would not be bound by the client-CPA privilege. *Id.* § .316(4)(a).

Not only does the Board's position defy common sense, but the Board has failed to come forward with any evidence showing that in-person solicitation jeopardizes the independence that CPAs are required to exercise in their attest function, despite the fact that it is the Board that bears the burden of proof. *See Fox*, 492 U.S. at 480. Indeed, the Board's position is actually undermined by the two sources on which the Board relies.

The first is the affidavit of Louis W. Dooner, which fails to demonstrate any link between in-person solicitation and dishonest conduct. Mr. Dooner simply asserts, without citation to facts or empirical evidence, that if the CPA "has solicited the client he will be beholden to him," and, therefore, the CPA "may be willing to bend the rules." J.A. at 19, 23. Nowhere does Mr. Dooner explain why a CPA who has solicited a client is any **more** beholden to that client than a CPA whose long-term association with a client has made him financially reliant on the client. Nor does Mr. Dooner explain why a CPA who solicits orally would be **more** willing to bend the rules than other CPAs, including those who solicit through other means.

Mr. Dooner also contends that a CPA who engages in oral solicitation may be less ethical than other CPAs because "the CPA is obviously in need of business." J.A. at 23. This contention overlooks the fact that all professional firms -- including CPA and law firms -- are constantly seeking new business to retain and expand their existing practices. The mere fact that a professional is seeking new business provides no foundation for Mr. Dooner's assumption that he or she would "be willing to bend the rules" to acquire new clients. Indeed, CPAs who engage in permissible forms of advertising and solicitation are also "obviously in need of business," yet Mr. Dooner does not accuse them of being willing to engage in wrongful conduct.

The Board's second submission is the *Report of the Special Committee on Solicitation* of the AICPA ("Report on Solicitation"), which is discussed in its Brief to this Court only in a footnote. *See* Pet. Br. at 31 n.27. The Report is the only rigorous analysis of the solicitation issue uncovered by either party, and, as noted above, *see* n.2 *supra*, the AICPA is the dominant standard-setting organization for CPAs. To understand the significance of the Report, it is necessary to know why it was prepared.

The AICPA has historically played the lead role in formulating ethics codes to guide the conduct of CPAs. In fact, the regulation of the public accounting profession in the United States dates back to 1917, when the American Association of

Public Accountants, now the AICPA, promulgated its first Code of Professional Ethics. J.A. at 43. Rule 8 of that Code provided that "[n]o member shall directly or indirectly solicit nor encroach upon the business of another member . . . ." *Id.* In 1948, the AICPA broadened the Rule to apply the ban on solicitation and encroachment to all prospective clients. *Id.* Plainly, neither version of the Rule was aimed at preserving the independence of CPAs in the attest function or protecting the public; both were designed to limit competition among CPAs.

Following this Court's ruling in *Bates v. Arizona State Bar*, *supra*, the Rule was amended in early 1979 to provide that "[a] member shall not seek to obtain clients in a manner that is false, misleading, or deceptive. A direct uninvited solicitation of a specific potential client is prohibited." *Id.* at 45. The Justice Department, which had expressed concern over the anti-competitive impact of AICPA's ethics rules as early as 1973, *id.*, threatened suit over the solicitation ban in the amended rule. *Id.* at 34, 45. To avoid litigation, which the AICPA believed it would lose because of the lack of evidence showing that in-person solicitation would compromise CPA independence or lead to abusive conduct by CPAs, *id.* at 45-46, the AICPA membership voted overwhelmingly to eliminate the solicitation ban. *Id.* at 46.

At the same time, the AICPA decided to study the solicitation question further, and, to that end, created a Special Committee on Solicitation, which issued its Report on Solicitation in 1981. *Id.* at 29. At the outset, the Report recommended that the "AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients . . . ." *Id.* at 34. In explaining this recommendation, the Report emphasized "the absence of persuasive evidence that direct uninvited solicitation is likely to lead to false or misleading claims or oppressive conduct makes it unlikely that the ban would be upheld in a judicial proceeding." *Id.* at 35. The same reasoning led the Committee to reject the idea that the AICPA should seek to influence state legislatures to adopt stringent anti-solicitation laws. The Report stated "that such bans, if enacted by legislatures, would probably not survive constitutional challenge if applied to nondeceptive, noncoercive instances of solicitation." *Id.* at 41.

The Report next rejected the contention that a ban is needed to preserve independence in the attest function, finding that there is no evidence to support such theory, and that, "[e]ven if such data were available, the committee's legal counsel advises that it would not justify a total prohibition of direct uninvited solicitation, oral or written, but only a narrow ban on solicitation of audit and review engagements." *Id.* at 38 & n.4. On the question of whether such a narrower ban should be imposed, the legal opinion on which the Committee relied observed that the "AICPA would have to prove that such conduct is likely to impair the independence of accountants in fact or is likely to be perceived as so doing by users of financial statements; we are presently unaware of any empirical data which would sustain this burden." *Id.* at 74-75. The Report concluded by stating that "[w]e are unaware of the existence of any empirical data supporting the theor[y] that CPAs . . . are not independent of clients obtained by direct uninvited solicitation . . .." *Id.* at 38-39. Thus, the primary source submitted by the Board actually **refutes** its arguments to this Court.[5]

The Board's claim that in-person solicitation threatens CPA independence is also at odds with the commentary on the CPA profession. None of the sources that respondent has identified even mentions oral solicitation as a threat to independence. Rather, the commentators agree that the more enmeshed the CPA becomes in the affairs of the client, and the more the CPA depends financially on the client, the greater is the threat to the CPA's independence. The most serious threat to independence is posed when an existing auditor becomes involved in providing

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[5] The Report also noted that "a preponderance of the AICPA membership believes that direct uninvited solicitation to acquire clients does not impinge on the independence of CPAs. The survey disclosed that 11 percent were in 'total agreement' with the proposition that impairment occurred, whereas 34 percent were in 'total disagreement.'" J.A. at 39. The description of the survey results in the Board's brief is not entirely accurate. While the Board argues that "[n]early two-thirds of the CPAs responding to the 'Survey' had grave difficulties with uninvited solicitation in any form," Brief at 32 n.27, the Board neglects to mention that the survey also reported that a "substantial majority" of members disagreed with the statements that "solicitation impairs the independence of CPAs," and "solicitation impairs the quality of services CPAs render." J.A. at 58; *see also id.* at 49 (summarizing survey's findings). Moreover, the Board overlooks the fact that, among the reasons why members have "negative attitudes" towards in-person

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the client with non-audit related management advisory services --such as executive recruitment, actuarial services, identification of merger and acquisition candidates, and valuation of assets. These activities are an important source of revenue for accounting firms, and the provision of these services renders the CPA more vulnerable to the client's demands.[6]

The other significant threat to CPA independence is "opinion shopping," *i.e.*, where the client "actively seeks an accountant who will support a proposed accounting treatment to accomplish the company's reporting objectives, regardless of whether that treatment is acceptable" under generally accepted accounting principles. GAO Report at 37. *See also* Daniel L. Goelzer, *The SEC and Opinion Shopping: A Case Study in the Changing Regulation of the Accounting Profession*, 52 Brook. L. Rev. 1057 (1987). Of course, the in-person solicitation ban addresses neither of these problems; impairment of independence resulting from fear of losing lucrative non-audit business arises only where there is a pre-existing relationship between CPA and client, and "opinion shopping" takes place only when the **client** engages in solicitation of CPAs, not the reverse.

The Board cannot excuse its failure to support its position with evidence on the ground that the ban makes it impossible to gather proof of wrongdoing. As mentioned above, only two other states, Louisiana and Texas, ban in-person solicitation. Every other state and the District of Columbia -- whose residents and

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[5] (...continued)
solicitation are their fears that solicitation "will tend to lower CPA fees," and "increase both litigation and government regulation of the profession," *id.* at 58, considerations not relied on by the Board.

[6] *See, e.g., The Accounting Establishment, supra*, at 34, 50-52; William Sternberg, *Cooked Books: Practices of Large Accounting Firms Contributed to Financial Scandals*, Vol. 269, No. 1, The Atlantic, 20 (Jan. 1992); GAO, *CPA Audit Quality: Status of Actions Taken to Improve Auditing and Financial Reporting of Public Companies*, 35 (Mar. 1989)(GAO/AFMD-89-38)(hereinafter "GAO Report"); Note, *The Big Eight, Management Consulting and Independence: Myth or Reality?*, 61 S. Cal. L. Rev. 1511 (1988); Note, *Failure to Maintain Independence: A Proposed Cause of Action Against Accountants*, 62 Tex. L. Rev. 923 (1984); Abraham J. Briloff, *The Accounting Profession Behind the Eight Ball*, 61 Tex. L. Rev. 1357 (1983).

businesses depend just as heavily on the accuracy of financial statements and audits as do Florida's -- permit in-person solicitation and have done so for years. J.A. at 46-48. Despite this wealth of experience with in-person solicitation, the Board has not presented evidence **of a single instance**, in Florida or elsewhere, in which solicitation led to any of the improprieties the Board says it fears.

Similarly, many federal regulatory agencies depend on the accuracy of audited financial reports, both to determine the soundness of commercial institutions they regulate (like banks and savings and loans) and to ensure that the government and investors are not being defrauded. For example, publicly held corporations must periodically submit audited financial statements to the Securities and Exchange Commission ("SEC"). Despite the fact that the SEC closely regulates auditors to ensure their independence, the SEC has never suggested that in-person solicitation jeopardizes the independence of CPAs.[7] Nor have any of the other regulatory agencies that use audited statements to monitor commercial entities, such as the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, and the Commodity Futures Trading Commission, imposed restraints on solicitation by CPAs.[8]

The Internal Revenue Service ("IRS") regulation relied on by the Board is not to the contrary. The Board asserts that the IRS "realize[s] the problems associated with direct, in-person, uninvited solicitation by CPAs, and ha[s] found such solicitation to be inappropriate." Pet. Br. at 29-30. The Board's implication is that the IRS forbids CPAs from soliciting clients for matters such as

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[7] *See* 17 C.F.R. §§ 210.1-01 et seq. (1992); *see also Matters Relating To Independent Accountants*, 6 Fed. Sec. L. Rep. (CCH) ¶¶ 73,251 & 73,295 (setting forth SEC's rulings relating to CPAs); II Louis Loss & Joel Seligman, SECURITIES REGULATION, 726-42 (3d ed. 1989)(discussing the SEC's regulation of CPAs); *see also* J.A. at 75.

[8] *See* 12 C.F.R. § 11.903 (1992) (Comptroller of the Currency); 12 C.F.R. § 335.604 (1992) (Federal Deposit Insurance Corporation); 12 C.F.R. §§ 563c.3 & 571.2(c)(3) (1992) (Office of Thrift Supervision); 17 C.F.R. § 1.16 (1992) (Commodity Futures Trading Commission).

the preparation of tax returns and giving general tax advice. However, the regulation cited by the Board proscribes in-person solicitation only where the representation involves a client in an adversarial proceeding before the IRS where the attorney, CPA, or enrolled agent actually functions as an attorney. Thus, under the IRS's regulation, anyone authorized to represent clients in contested matters before the agency would be forbidden from soliciting individuals who had, for instance, notices of tax liens or deficiencies filed against them. But the regulation has nothing to do with CPAs like Fane, who specialize in rendering advice on business tax matters and preparing tax returns for businesses. See IV Boris I. Bittker & Lawrence Lokken, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 110.2.1, at 110-19 (2d ed. 1992).

The Board's attempt to cushion the harshness of the ban, by arguing that a CPA "may attend trade shows, luncheon clubs, and other such meetings and engage in direct, in-person, solicitation," J.A. at 22-23, further reveals the flaws in its position. This contention is flatly inconsistent with the plain meaning of the regulation, which does not exempt solicitations merely because they take place outside of the office. More importantly, under the Board's theory that in-person solicitation facilitates fraud or abuse, the ban must operate any time there is "the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules." *Id.* at 23. The notion that a CPA can properly engage in solicitation at a luncheon meeting, but not in a client's office or over the telephone, is not only bizarre, but wholly inconsistent with the Board's rationale. The same ingredients are present in each situation -- there is a CPA attempting to sell his or her services orally to a potential client who did not initiate the conversation. Indeed, even when a CPA makes contact with the client through a newspaper advertisement or a referral, at some point, the CPA and client will meet face-to-face. It is senseless to suggest that such an encounter is more fraught with danger to the public that will eventually rely on audited financial statements simply because the CPA's initial solicitation takes place in-person or over the telephone, rather than through a referral or an advertisement.

As is apparent, the Board's argument that CPAs who engage in solicitation will be enticed into engaging in collusion or fraud simply because they have orally solicited a client's business consists of nothing more than smoke and mirrors. Although the Board bears the burden of "affirmatively establish[ing]" that the ban directly furthers the asserted state interest, *Fox*, 492 U.S. at 480, it has proffered no evidence to that effect at all, while the evidence that is available establishes that there is no nexus between CPA solicitation and fraud or abuse. Accordingly, the ban cannot be sustained.

2. The Board Has Failed To Establish That The Ban Is Needed To Prevent Overreaching By CPAs.

Recognizing the weakness of the argument that it has relied on throughout this litigation, the Board now contends that the ban, which originated as a mechanism to protect established CPAs from competitors, is needed to protect prospective clients from overreaching and undue influence by soliciting CPAs. The Board does so in its attempt bring this case within the ambit of *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), which it contends is controlling. The Board's belated effort to find shelter in *Ohralik* is unavailing.[9]

The Board's reliance on *Ohralik*, which concerned a factual and professional context far different from that surrounding this case, is misplaced. Ohralik was an experienced member of the Bar

[9] Because the Board disavowed this argument in the lower courts, it should not be considered here. Mr. Dooner's affidavit, on which the Board relies to explain the rationale underlying the ban, states that it is "for the protection of the users of financial statements. *It is not to protect the public from solicitors.*" J.A. at 20 (emphasis added). The Board's lower court briefs did not make this argument, and the Board's petition for a writ of certiorari similarly relied solely on the attest function argument, stating that "any other potential motivating factors [underlying the ban] are not relevant to the justification of the rule in question." Pet. for Cert. at 11 n.10. Although the Board discussed *Ohralik* in all of its submissions, it did so in an attempt to support its contention that the difficulties in policing face-to-face encounters increased the possibility that CPAs and clients would engage in collusion and fraud. Having renounced this argument below, the Board should not be permitted to raise it before this Court. *See Yee v. Escondido*, 112 S. Ct. 1522, 1531 n.4 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).

who sought to represent two teenage women who were recent accident victims. 436 U.S. at 449. At the time he solicited their business, one was still hospitalized; the second had just been discharged from the hospital after nearly two weeks of care. *Id.* at 449-50. Neither had a clear understanding of her legal rights, although both apparently were aware that they had significant rights at stake. *Id.* To compound the problem, it was apparent from the outset that the two women's rights were potentially in conflict, but Ohralik nevertheless sought to represent them both. *Id.* at 450-51. Ultimately, each of the women filed a complaint against Ohralik with the local Bar, which found that Ohralik had violated the Bar's disciplinary rules. The Ohio Supreme Court agreed, and imposed an indefinite suspension. *Id.* at 454.

In affirming the suspension, the Court contrasted in-person solicitation with advertising by lawyers: "Unlike a public advertisement, which simply provides information and leaves the person free to act upon it or not, in-person solicitation [by lawyers] may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457 (footnote omitted). The Court was troubled that the "aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking . . .." *Id.*

These problems are particularly acute "when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed person." *Id.* at 465. In such a case, "an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Id.* Thus, the Court concluded, while Ohralik's conduct was "entitled to some constitutional protection," *id.* at 459, "it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited." *Id.* at 466 (footnote omitted).

As is evident, the factual gulf between this case and *Ohralik* is deep. To start with, like its argument relating to the attest

function, the Board's thirteenth-hour claim that the ban is necessary to protect clients is not supported by a scintilla of evidence. In marked contrast to *Ohralik*, which arose in the context of a specific enforcement proceeding where there was ample evidence of overreaching, the Board has not cited a single instance where a CPA has engaged in abusive solicitation, much less sufficient evidence for the Court to conclude that oral solicitation by CPAs "more often than not will be injurious to the person solicited." *Id.* Nor has the FTC or the AICPA uncovered any such evidence. The FTC "never found any evidence that accountants have engaged in or are likely to engage in abusive solicitation" during its extensive investigation into the accountancy profession (*see* n. 10, *infra*), and the AICPA found no evidence that "direct uninvited oral solicitation is likely to lead to false, misleading or deceptive claims or oppressive conduct." J.A. at 35. In-person solicitation is permitted in almost every jurisdiction in the country. If there were any substance to Florida's fears about oppressive CPA conduct, there surely would be **some** evidence of abuse; yet Florida cites none.[10]

The absence of evidence of abusive solicitation practices by CPAs reflects the considerable differences between lawyers and CPAs. Lawyers are "trained in the art of persuasion," *Ohralik*, 436 U.S. at 465, and direct solicitation by lawyers involves "the coercive force of the personal presence of a trained advocate." *Zauderer*, 471 U.S. at 641; *Shapero*, 486 U.S. at 475. In contrast, as the district court noted, CPAs are not trained to take particular advantage of a personal encounter. To the contrary, their training places the highest emphasis on independence and objectivity. J.A. at 80; *see also United States v. Arthur Young & Co., supra*.

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[10] In advising the National Association of State Boards of Accountancy ("NASBA") to delete language from its model rule that prohibited coercive or overreaching solicitation practices on the ground that these "ambiguous restrictions" might be used to restrict "solicitation under circumstances that pose no danger of harm to consumers," the FTC stated that, "during our investigations of the accounting profession, we have never found any evidence that accountants have engaged in or are likely to engage in abusive solicitation. It does not appear likely that accountants would find abusive conduct to be an effective marketing device." Following the FTC's recommendation, NASBA amended its model rule to delete the offending language on September 24, 1988. *See* Exhibits A & B attached to Plaintiff's Motion for Summary Judgment, filed on December 8, 1988, and (continued ...)

There is also a vast difference between the sophisticated business clients whom Fane seeks to solicit, and the needs of individuals who are likely to be solicited by an attorney. Most lawyer solicitation is aimed at people who have an immediate need for specific representation, such as those arrested for driving under the influence of alcohol (*Zauderer*) or who are involved in a divorce action (*Bates*) or tort case (*Shapero/Zauderer*). In such cases, the lawyer's interest is in being retained to represent the client on one specific matter; the lawyer is not seeking to establish an ongoing relationship, and hence may conceivably resort to deceptive tactics or overreaching to obtain the client. Making matters worse, the potential client is often facing considerable stress, may need to find legal counsel promptly, and is generally unsophisticated about the law. *Ohralik*, 436 U.S. at 465 & n.24. *Ohralik* graphically illustrates the potential for overreaching where the targets of the solicitation are emotionally vulnerable.[11]

In contrast, none of Fane's prospective clients is confronting the trauma of a recent accident, the disappointment of a failed marriage, or the stigma of a criminal arrest. Rather, Fane seeks to attract a clientele of small and mid-size businesses, which have ongoing accounting needs that are sufficiently complex to justify the retention of a highly-skilled CPA on a long-term basis. The individuals who run these companies are well-educated, experienced businesspersons, who are accustomed to dealing with professionals like Fane. And, although the Board overlooks this point, the district court's order permits in-person solicitation only "in the business context," which means that the concerns about

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[10] (... continued)
Statement 8, Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, filed on December 8, 1988, in *Fane v. Edenfield*, Civ. Action No. 88-10140 (N.D. Fla.).

[11] The same factors led a divided panel of the Fourth Circuit to uphold West Virginia's ban on oral solicitation of "pre-need" funeral contracts in nursing homes, hospitals, and residences. *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989), *cert. denied*, 493 U.S. 966 (1990). Not only was the ban more narrowly tailored in that case, since funeral homes were free to engage in oral solicitation in places other than nursing homes, hospitals, and residences, but the state's rule was apparently based on a history of abuses. Here, in contrast, Florida's rule is categorical, and is not based on any evidence that abuses have occurred.

personal privacy and emotional vulnerability cited by the Court in *Ohralik* are not implicated in this case.

The *Ohralik* Court also supported its ruling by citing the difficulties inherent in policing a face-to-face transaction between lawyer and client -- difficulties that exist in part because there would be no record of what transpired. But that is far less of a problem with CPAs. As the district court observed, in "the CPA context . . . proof regarding alleged misconduct is readily available. The relevant financial data could be obtained" from the client and "[i]rregularities could be uncovered" because the facts in accounting "are objectively verifiable." J.A. at 88.

Lastly, *Ohralik* did not deal with a solicitation ban that was substantially underinclusive. In *Ohralik*, only an attorney could have represented the young women in their tort cases and all lawyers were forbidden from engaging in oral solicitation. In Florida, however, other financial professionals, such as accountants, tax preparers, and financial consultants, can perform many of the same functions as CPAs, but they remain free to engage in precisely the solicitation activities that are off-limits to CPAs. This is so despite the Board's insistence that a ban is needed because "[o]nly by preventing such contacts before they occur can the state prevent fraud, overreaching or misrepresentation (more likely when the CPA is engaged in tax representation, financial or management services)," Pet. Br. at 24, services which are also performed by non-CPAs. This anomaly is magnified by the fact that, whereas CPAs are subject to strict and ongoing licensure requirements, which are designed to ensure competence and good moral character, non-CPAs are unregulated by Florida. It defies logic to contend that Florida has a valid interest in protecting clients from abusive solicitation activities by licensed CPAs, but has no interest in policing the same solicitation practices of other financial practitioners, all of whom are unregulated. *Cf. The Florida Star v. B.J.F.*, 461 U.S. 524, 540 (1989)(underinclusiveness of statute raises serious doubts about whether state is serving the interests that it claims are furthered by the statute); *see also id.* at 541-42 (Scalia, J., concurring). Yet that is the Board's argument.

Respondent recognizes that, although there is no basis for the Board's claim that *Ohralik* is controlling here, this Court has continued to express concern about the potential for abuse posed by in-person solicitation. For instance, last term in *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992), the Court upheld a ban against soliciting funds in certain areas at three airports. In so ruling, six members of the Court cited the risk of fraud and overreaching that comes with the type of in-person solicitation that demands an immediate response. However, those concerns have little bearing here. The solicitation in which Mr. Fane proposes to engage will not occur in the crowded corridors of a congested airport or at someone's front-door; rather, it will take place over the telephone, at the office of the businessperson being solicited, or at a social function. The nature of the services performed by a CPA make it impossible for Fane to demand any sort of "immediate response"; all that he can ask is that the prospective client consider retaining his services. Thus, there is a built-in "cooling off period" with regard to the sale of any professional services. Nor is Fane seeking to solicit weary or otherwise vulnerable travelers. To the contrary, the relief granted to Fane by the district court allows only the solicitation of business clients. And, as noted above, the FTC has long fought against restraints on solicitation by professionals like Fane, precisely because the concerns cited by the Court in *Lee* are not present. *See American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'd sub nom. American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *American Dental Ass'n*, 94 F.T.C. 403 (1979).

As we have shown, the Board's efforts to find shelter for its position in *Ohralik* are wholly unavailing. *Ohralik* stands for the principle that, in truly exceptional circumstances where solicitation "more often than not will be injurious to the person solicited" (436 U.S. at 466), a prophylactic ban on certain speech may be imposed. These exceptional circumstances certainly do not exist here, where the Board has failed to offer **any** evidence of abuse. As the Court has repeatedly admonished, a state cannot base a prophylactic rule on unsupported assertions or imaginary misconduct; rather, it must back up its claim of potential harm with evidence in the record. *Zauderer*, 471 U.S. at 644-47; *see also Fox*,

492 U.S. at 480. Because Florida has failed to carry its burden of proof, its solicitation ban may not be sustained. *See also* J.A. at 76-77.

B. Florida's Ban Is Not Narrowly Tailored.

There is another reason why the Board's anti-solicitation regulation cannot withstand scrutiny under the First Amendment. The final element of the *Central Hudson* test is whether the regulation is "narrowly tailored to achieve the desired objective." *See Fox*, 492 U.S. at 480. No such showing has been made here. The Board's rule is an absolute ban, which proscribes far more speech than is necessary in light of the justifications offered for the restraint.

Throughout its brief, the Board argues that Florida's principal concern is with preserving the independence of CPAs in the attest function. Yet nowhere does the Board explain why existing regulatory requirements apart from the ban -- which flatly forbid a CPA from engaging in fraud or compromising his or her independence -- are inadequate. This is not a trivial oversight on the Board's part. The law is clear that, if the state can combat wrongdoing by direct means, it cannot use its general interest in preventing isolated abuses to justify a broad-scale restraint on speech. *See Shapero*, 486 U.S. at 476; *Zauderer*, 471 U.S. at 644, 646-47; *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 768-69.

Florida has more than ample means in place to deter CPAs from engaging in fraudulent conduct wholly aside from the solicitation ban. First, an accountant who knowingly abuses the attest function engages in fraud. In Florida -- as elsewhere -- fraud is a serious crime, in most instances a third degree felony, punishable by substantial jail time. *See* Fla. Stat. Ann. §§ 817.15, 817.16, & 817.34. That alone stands as a powerful deterrent.

Second, under Fla. Stat. Ann. § 473.315, a CPA is strictly forbidden from performing the attest function "unless he and his firm are independent with respect to such enterprise." Violation of this restriction is punishable by penalties ranging from heavy

fines to license revocation. *See* Fla. Stat. Ann. §§ 473.323(b) & (c). Obviously, the threat of being cut off from one's livelihood, and the public opprobrium that would accompany a license revocation proceeding, stand as powerful deterrents. Moreover, the Board could strictly enforce the existing prohibitions that forbid CPAs from engaging in fraudulent or deceptive conduct, which plainly prohibit the very misconduct the Board says it fears. *See* Fla. Stat. Ann. §§ 473.323(f) & (k).

Third, false certification of financial statements or audits is an open invitation to tort litigation. In most jurisdictions, negligent certification can give rise to tort liability; deliberate misconduct by the CPA would almost inevitably trigger a punitive damages award. While Florida has, until recently, followed Justice Cardozo's opinion in *Ultramares v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931), which limits an accountant's liability for ordinary negligence to those in privity with the accountant, the Florida Supreme Court has announced that a CPA can be held liable to those persons whom an accountant "knows" will rely on his opinion, without regard to privity. *First Florida Bank v. Max Mitchell & Co.*, 558 So.2d 9 (1990). Moreover, the Florida courts have admonished time and again that either fraud or gross negligence opens up the accountant to third-party actions. *Investment Corporation of Florida v. Buchman*, 208 So.2d 291 (Fla.2d DCA), *cert. dismissed*, 216 So.2d 26 (Fla. 1968); *Canaveral Capital Corp. v. Bruce*, 214 So.2d 555 (Fla.3d DCA 1968); *Mulligan v. Wallace*, 349 So.2d 745 (Fla.3d DCA 1977); *Investors Tax Sheltered Real Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath*, 370 So.2d 815 (Fla.3d DCA 1979); *see also A.R. Moyer v. Graham*, 285 So.2d 397 (Fla. 1973). Surely, the prospect of financial ruin stands as an additional, powerful disincentive to CPA misconduct.

What is more, even if the Board concluded that only a solicitation ban would suffice to deter CPAs from compromising their independence -- a conclusion virtually all other jurisdictions have rejected -- the Board's regulation is not narrowly tailored because it applies to **all** CPAs and **all** in-person solicitation by CPAs, whether or not they are seeking to conduct audits that might entail attestations. CPAs who specialize in tax, financial planning,

employee benefits, estate planning, and many other aspects of the accountancy profession, have no occasion to attest to the accuracy of audits or financial statements. J.A. at 25-26. At the very least, the Board had the duty to explore a less intrusive alternative, such as a ban limited to audit and attest function engagements. *See Shapero*, 486 U.S. at 476; *see also* J.A. at 38 & n.4. The Board's silence on this issue is especially telling in light of Florida's ban on competitive bidding by CPAs, which is limited to audit and attest engagements, making it evident that a narrower ban would be feasible. Fla. Stat. Ann. § 473.317.[12]

Other narrowly tailored alternatives exist as well. For one thing, the Board could impose a reasonable "cooling off" period, during which any client would be free to repudiate a representation agreement with a CPA and be entitled to a full refund of any monies paid. This kind of device, which is now commonplace (*e.g.*, 16 C.F.R. § 429.1 (1992)), would fully address the Board's concerns about abusive solicitation practices. Alternatively, the Board could require that all initial meetings between CPAs and prospective clients be tape-recorded, and the tapes preserved for a period of years. Not only would such a requirement serve as a powerful deterrent to abusive practices, but it would also provide the Board with an enforcement tool. Or, the Board could impose a variant of the proposal the Court made in *Shapero* regarding the regulation of mail solicitation (*see* 486 U.S. at 477), *i.e.*, the Board could require CPAs who wished to engage in direct solicitation to register with the Board, provide a written statement of the information he or she intends to disseminate, and furnish the Board with a list of those businesses the CPA contacts. But the Board has never explored these less burdensome alternatives to an outright ban.

Finally, nowhere does the Board attempt to defend its ban on telephone solicitation. All of the Board's arguments relating to

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[12] Of course, such a more limited ban would be constitutional only if there were evidence that oral solicitation facilitated fraud in the attest function by CPAs and clients, and, as respondent has shown, the Board has produced no such evidence. J.A. at 38 & n.4.

overreaching by CPAs apply, if at all, only to face-to-face encounters between CPAs and prospective clients. Whatever force those concerns may have, they disappear altogether if the client can terminate the encounter simply by hanging up the receiver. This Court has not had occasion to deal with the validity of restraints on telephone solicitation, but in terms of the danger such activity poses to the prospective client, solicitation by telephone is far closer to direct mail solicitation than to in-person solicitation because of the ease with which a telephone solicitation can be ended. If the burden of having to send an unwanted mailing on the short journey from the mail box to the trash can is too insignificant to justify a prohibition on uninvited commercial speech, as this Court has held numerous times, *see, e.g., Shapero*, 486 U.S. at 475-76, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980), then surely the burden of having to hang up the telephone to discontinue an unwanted conversation with a CPA can be of no greater moment. *Cf. Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975). Nonetheless, the Board's prohibition applies with equal force to telephone solicitations.

As is evident, the Board has failed to satisfy the demanding standard this Court articulated in *Fox*. There is simply no evidence justifying its restriction, let alone proof that it is "narrowly tailored to achieve the desired objective." Accordingly, the decision below should be affirmed for this reason as well.

C. The Discriminatory Nature of the Ban Demonstrates That The Ban's Purpose Is To Stifle Competition, Not To Protect the Public.

Florida's ban on oral solicitation is directed only at CPAs, and not at the broad array of other financial professionals against whom CPAs compete. The discrimination promoted by the ban

both violates the Equal Protection Clause of the Fourteenth Amendment and underscores the bankrupt nature of Florida's argument that the ban serves a substantial state interest.[13]

Under Florida law, CPAs, accountants, tax preparers, bookkeepers, and other financial professionals may lawfully engage in a broad array of accountancy and financial service activities, except for the attest function. Yet only CPAs are subject to the anti-solicitation rule, and that prohibition extends to *all* services performed by CPAs, not just those requiring attestations. Every other financial professional, except a CPA, remains free to engage in any form of direct, in-person solicitation that he or she deems appropriate -- including telephone calls and personal visits.

Not only is this discrimination invidious, it is backwards and utterly irrational, since it is aimed at the only financial professionals that are regulated by the state. As noted above, **only** CPAs are licensed and directly supervised by the Board (*see* Fla. Stat. Ann. §§ 473.306-308); **only** CPAs are required to demonstrate their continuing competence and good moral character (*id.*); and **only** CPAs are subject to the Board's disciplinary procedures. *See* Fla. Stat. Ann. §§ 473.322-324. In short, if there were any justification for the solicitation ban apart from the attest function, it would apply with far greater force to non-CPAs, yet Florida prohibits only highly-regulated CPAs from engaging in solicitation.

The ban's focus solely on CPAs betrays its real goal, to suppress competition among CPAs. As noted above, not only is there no evidence that the ban serves any valid state interest, but there is every indication that the anti-solicitation rule is one of the few remaining artifacts from a time when a wide array of competitive practices -- advertising, solicitation, and competitive bidding

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[13] It makes no difference whether this Court applies heightened scrutiny to respondent's equal protection claim on the ground that the ban impinges on Fane's right to engage in speech, *cf. Carey v. Brown*, 447 U.S. 455, 461-63 (1980), the intermediate level of scrutiny the Court applies in commercial speech cases, *see Central Hudson, supra*, or even the rational basis test, *see Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), because the discrimination promoted by the ban is utterly irrational, and cannot withstand any level of review.

-- were forbidden. There can be no question about the anti-competitive lineage of the ban; its antecedent is the AICPA's "anti-encroachment rule," and the ban has existed side-by-side with the rule (also first adopted by the AICPA in 1917), now codified by Florida at Fla. Stat. Ann. § 473.317, forbidding CPAs from engaging in competitive bidding for attest function engagements. Moreover, the only CPAs harmed by the solicitation ban are new entrants into the accountancy profession in Florida, who are seriously hampered in their efforts to secure clients. The rest of the profession benefits from the ban, because it stifles competition, making it easier to retain clients and to charge high fees. *Cf.* J.A. at 58 (AICPA survey finding that CPAs who oppose solicitation fear that it "will tend to lower CPA fees").

Because of their serious anti-competitive effects, both the Justice Department and the Federal Trade Commission have long fought to eliminate barriers to in-person solicitation imposed by private organizations and state boards of accountancy. The AICPA withdrew its solicitation ban in 1979 after it was threatened with litigation by the Justice Department. In 1981, the AICPA promulgated another version of its advertising and solicitation Rule, which provided that "[s]olicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited." The FTC targeted this Rule during its investigation into the accountancy profession because it discouraged in-person solicitation, 54 Fed. Reg. 13529 (April 4, 1989), and on August 7, 1990, the FTC and the AICPA entered into a consent decree, under which the AICPA agreed to refrain from taking any action restricting or interfering with "[t]he solicitation of any potential client by any means, including direct solicitation." *See* 55 Fed. Reg. 40944 (Oct. 5, 1990)(announcing consent decree). *See also Rhode Island Board of Accountancy*, 107 F.T.C. 293 (1986)(enforcement action against state board of accountancy to force it to eliminate anti-solicitation ban).

To be sure, because the regulation at issue here was issued by a state instrumentality, it is immune from attack under the antitrust laws. *Bates v. State Bar of Arizona, supra*, 433 U.S. at 359-63. But that does not alter the fact that, despite the Board's

protests, the regulation in fact serves only the parochial interests of the entrenched members of the CPA profession, while driving up costs to consumers. That hardly qualifies as a legitimate state interest. For this reason as well, the ban cannot be sustained.

II. FLORIDA'S BAN CANNOT BE DEFENDED AS A REASONABLE TIME, PLACE AND MANNER RESTRICTION.

Apparently recognizing that the solicitation ban cannot withstand the demanding scrutiny required for outright prohibitions on commercial speech, the Board seeks to lessen the intensity of review by arguing that the ban is not really a ban at all, but is merely a time, place, and manner restriction that must be upheld as reasonable. This argument fails for three reasons. First, the Court has consistently held that complete bans on particular modes of expressive activity cannot be upheld under the time, place, and manner doctrine; second, the ban is not "content-neutral," and hence it must be subjected to the same level of scrutiny applied to all restraints on commercial speech; and third, even assuming that the time, place, and manner doctrine applies, the restriction fails that test as well, because it is not reasonable.

1. The most fundamental failing with the Board's argument is that simply calling the rule a time, place, and manner restriction does not make it so. The Board's ban does not merely regulate when, where, or how a CPA may ask a potential client to consider hiring him or her, but instead categorically forbids any effort by a CPA to engage in oral solicitation of potential clients -- everywhere and at all times.

Nonetheless, the Board contends that the regulation merely imposes a "manner" restriction, since CPAs remain free to engage in written solicitation. But none of the lawyer advertising cases decided by this Court discussed or relied on the time, place, and manner doctrine, or even characterized the restraint at issue as a "manner" restriction. *See, e.g., Zauderer, supra; Shapero, supra*. To the contrary, this Court has repeatedly ruled that blanket prohibitions aimed at particular modes of expression

cannot be justified under the time, place, and manner doctrine. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983); *Schad v. Mt. Ephraim*, 452 U.S. 61, 76 (1981); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977); *Virginia State Bd. of Pharmacy, supra*, 425 U.S. at 771. This Court has made clear that categorical restraints are extremely disfavored, and may be sustained only if they serve compelling interests and are drawn with an especially high level of precision. *See, e.g., Grace*, 461 U.S. at 177 ("[a]n absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"). That is the standard that governs this case, which the Board cannot meet.[14]

2. The Board's analysis also fails because "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of the speech." *Consolidated Edison Co.*, 447 U.S. at 536; *accord Pacific Gas & Elec. Co. v. Public Utility Comm'n*, 475 U.S. 1, 20 (1986). As the Court explained in *Ward*, 491 U.S. at 791, "[g]overnment regulation of expressive activity is content-neutral so long as it is *'justified* without reference to the content of the regulated speech.'" (Emphasis in original, citations omitted). *Accord Boos v. Barry*, 485 U.S. 312, 320-21 (1988).

Applying this principle here, it is clear that the Board's regulation is a content-based restriction which must be subjected to the more exacting scrutiny ordinarily applied to restrictions on commercial speech. There is no question that Florida's regulation can be justified, if at all, "*only* by reference to the content of the speech," *Boos v. Barry*, 485 U.S. at 321 (emphasis in original). By definition, all restraints on commercial speech are content-based in that they are imposed precisely because the state seeks to regulate some communicative aspect of a commercial transaction. What is more, the regulation has all the attributes of a classic

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[14] An example of a "manner" restraint is the regulation at issue in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), where the question posed was not when or where the rock concert could be held, but whether the city's regulation of the "manner" in which the music could be presented (*i.e.*, its decibel level) was reasonable.

content-based restraint: it is a speaker-specific, unqualified ban on a category of expressive activity, namely the direct, in-person solicitation of potential clients by CPAs. The rule forbids speech precisely **because** of its message; CPAs are free to say whatever they want, to whomever they please, whenever they want, **except** that CPAs, and CPAs alone among their competitors, are forbidden from asking potential clients for their business. In this respect, the ban is indistinguishable from both speaker-specific and content-specific restraints that this Court has held are not to be judged under the time, place, and manner doctrine.[15]

Nor is the Board on any firmer ground in its reliance on *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). The Board argues that its ban on solicitation, like the ban on nude dancing in *Barnes*, or the prohibition against the destruction of draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968), is not an effort to regulate speech, but is intended to regulate conduct, that is, abusive solicitation practices by CPAs. The Board seeks support for this argument from *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), where the Court held that a zoning restriction on the location of "adult" movie theaters could be justified by the "secondary effects" such theaters might have on the surrounding businesses and residences. Arguing that its ban is principally directed at the "conduct" and "secondary effects" of CPA solicitation, the Board contends that the Court should apply the *O'Brien* test in assessing the constitutionality of the solicitation ban.

The flaw in the Board's analysis is that *Barnes* and *Renton* involved restrictions that could be justified because they were directed at conduct -- conduct that had nothing to do with listeners' reactions to the speech. *See Barnes*, 112 S. Ct. at 2470-71 (Souter, J., concurring). But under either of the Board's

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[15] *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-49 (1992) (penal statute forbidding "bias-motivated" crime); *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992) (ban on distribution of political literature near polling places); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (statute restricting speech about crime); *Police Department of Chicago v. Mosley*, 416 U.S. 171 (1972) (ban on labor picketing).

theories, the regulation is aimed at the impact the speech might have on the listener. Thus, the Board seeks to suppress truthful oral solicitation by CPAs because it will either incite some businesspersons to seek to commit fraud, or lead some businesspersons to make ill-informed judgments about hiring CPAs. But as the Court said in *Boos v. Barry*, "[r]egulations that focus on the direct impact of speech on its audience present a different situation" than that in *Renton*, and "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." 485 U.S. at 321; *accord R.A.V. v. City of St. Paul*, 112 S. Ct. at 2549 & n.7; *Linmark Associates*, 431 U.S. at 94. Accordingly, because Florida's solicitation ban is plainly content-based, the time, place, and manner doctrine is inapplicable.

3. Finally, even were the Court to apply the time, place, and manner doctrine, that would not save the ban because the restriction is not reasonable. The Board appears to contend that, because it can **theorize** (but not adduce evidence showing) that harm could result from oral solicitation, the ban should be upheld as a mere "manner" restraint. But the Board's effort to equate time, place, and manner review with low-level rational basis review is plainly in error. This Court has repeatedly made clear that time, place, and manner review is an intermediate standard which requires reasonably precise regulation in the furtherance of an important governmental interest. Indeed, the time, place, and manner test incorporates several features that parallel the analysis established for restraints on commercial speech in *Central Hudson*: the state bears the burden of proving that the restraint is "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798; *accord Schad*, 452 U.S. at 76; *Lindmark Associates*, 431 U.S. at 94.

As we have shown, the Board has failed to meet that burden. Florida's ban is a paradigm of an unreasonable regulation. The Board has mustered no evidence that the ban serves **any** valid public purpose, let alone a substantial one. To the contrary, the ban is a textbook example of protectionism at its worst because it preserves the financial interests of the entrenched members of the profession at the public's expense. The Board's claim that

Florida's ban serves a substantial state interest is further belied by the ban's underinclusiveness; if Florida feared abusive solicitation practices, it would forbid solicitation by all financial professionals who perform functions similar to those performed by CPAs, yet only CPAs are forbidden from engaging in solicitation.

Florida's ban also proscribes far more speech than is necessary to achieve its asserted goals. Florida states that its ban is primarily aimed at preserving the integrity of the attest function -- but its ban is a blanket one, preventing even CPAs who never attest to the accuracy of financial statements from offering all the non-attest services they provide, including a wide array of services also offered by competing professionals who are permitted to engage in oral solicitation. Florida also has ample and direct means to deter abusive solicitation practices and fraud without resorting to an outright ban. The Board has nowhere explained its failure even to consider regulatory approaches short of a categorical ban, such as a reasonable "cooling off" period during which clients would be free to terminate agreements entered into with a CPA. These and the other options open to Florida would address the State's concerns, yet none has even been considered. To the contrary, Florida has done precisely what this Court has condemned in prior cases; it has imposed a sweeping, anti-competitive ban on the basis of nothing but speculation about possible isolated abuses. Accordingly, even under the time, place, and manner doctrine, Florida's solicitation ban violates the First Amendment and must be set aside.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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September 14, 1992